

1 I would say if distribution is
2 what the NFL Network is seeking, they can
3 lower their price and get higher distribution.
4 There is nothing that Comcast has done to stop
5 them from doing that.

6 The next is that if one looks at
7 the degree of competition in the market there
8 is sufficient competition that Comcast -- the
9 way economists would like to think about it --
10 would not obtain "power over price." That is,
11 they couldn't significantly increase the price
12 of the Golf Channel or Versus, because of the
13 degree of competition.

14 I have analyzed, I don't know,
15 probably a hundred mergers. And if there is
16 a merger where there is 24 players in the
17 market and it goes to 23, there is no
18 potential harm to consumers from such a
19 merger, and that is -- effectively would be
20 the extreme example if the NFL Network went
21 fully out of business. That's -- they would
22 go from 24 competitors to 23, whatever the

1 precise number is.

2 And so there is no plausible claim
3 of harm to competition in, say, the
4 advertising market, because of that -- because
5 of the degree of competition in that market.
6 And this is discussed in much more detail
7 here.

8 And then, it is a fair market
9 value analysis that I touched on earlier, that
10 from an econometric perspective, from just a
11 plain common sense perspective, it doesn't
12 hold water. It doesn't produce reliable
13 results. And so one cannot base a -- say that
14 61 cents is a reliable estimate.

15 JUDGE SIPPEL: Okay. And,
16 obviously, you've got a lot in there to
17 support those arguments.

18 THE WITNESS: Yes. It goes on for
19 79 pages or so.

20 JUDGE SIPPEL: I'll say no more.
21 That's it. That's all I have.

22 MR. TOSCANO: Your Honor, you've

1 covered my questions. I have nothing.

2 JUDGE SIPPEL: My goodness. Well,
3 okay, does anybody have anything more?

4 MR. SCHMIDT: Not from here, Your
5 Honor.

6 JUDGE SIPPEL: You're finished.

7 THE WITNESS: Thank you very much.

8 JUDGE SIPPEL: You've completed
9 your testimony.

10 THE WITNESS: Thank you.

11 JUDGE SIPPEL: I'd ask you not to
12 talk about this -- there are fact witnesses
13 that are coming in, but I want to ask you not
14 to talk about your testimony to any of the
15 fact witnesses until the case is all over.
16 Okay? Thank you.

17 THE WITNESS: Thank you very much.

18 JUDGE SIPPEL: You are relieved
19 from your oath, and you're on your way.

20 THE WITNESS: Thank you.

21 (Whereupon, the witness was
22 excused.)

1 MR. CARROLL: Your Honor, may we
2 call our next witness?

3 JUDGE SIPPEL: We may. Well, yes,
4 is anybody -- is everybody set to go? Does
5 anybody have any --

6 MR. CARROLL: I will actually just
7 do it from here. It will be very fast.

8 JUDGE SIPPEL: I'm for it. I
9 mean, I just want to be sure -- people like
10 the Court Reporter, you know, people who are
11 working. Ma'am, are you okay?

12 THE COURT REPORTER: Yes.

13 JUDGE SIPPEL: Well, let me know
14 when. Passing out is not a good signal.

15 Okay. Yes, sir.

16 MR. CARROLL: Let me call -- Your
17 Honor, we call as our next witness Stephen
18 Burke.

19 JUDGE SIPPEL: Mr. Burke, hello.
20 Please come forward.

21 Okay. I'm just going to
22 administer the oath to you. Would you raise

1 your right hand, sir?

2 MR. BURKE: Okay.

3 WHEREUPON,

4 STEPHEN BURKE

5 was called as a witness by Counsel for Comcast

6 Cable Communications and, having been first

7 duly sworn, assumed the witness stand, was

8 examined and testified as follows:

9 JUDGE SIPPEL: Thank you, sir.

10 Please be seated.

11 Does Mr. Burke have water or

12 anything that he might need?

13 MR. CARROLL: Ah. You're very

14 kind, Your Honor.

15 JUDGE SIPPEL: Okay. Just make

16 yourself comfortable.

17 THE WITNESS: Okay.

18 JUDGE SIPPEL: There is a

19 microphone. Be sure he understands that there

20 is a microphone there, and the Court Reporter

21 is over here. So it's just -- if you have a

22 naturally good speaking voice, it won't be any

1 problem, but just point towards the
2 microphone.

3 Go ahead.

4 MR. CARROLL: Your Honor, for my
5 direct exam, I don't think I need this
6 proceeding closed, so I just wanted to let you
7 know that.

8 JUDGE SIPPEL: You don't need this
9 proceeding what?

10 MR. CARROLL: We have had this
11 proceeding closed this afternoon and non-
12 public.

13 JUDGE SIPPEL: Oh.

14 MR. CARROLL: For my direct
15 examination of this witness -- we did that I
16 think at the NFL's request during the cross
17 examination of the last witness.

18 JUDGE SIPPEL: Can we just leave
19 the door open? And I will ask Ms. Gosse to
20 let the press office know that, for whatever
21 value it is at this hour. But thank you.

22 MR. CARROLL: You're welcome, Your

1 Honor.

2 JUDGE SIPPEL: Does anybody else
3 have any objection or problem with that?

4 MR. PHILLIPS: Not for direct,
5 Your Honor. But for the cross I may need to
6 --

7 JUDGE SIPPEL: Well, let's see
8 what happens.

9 MR. PHILLIPS: Wait and see what
10 happens.

11 JUDGE SIPPEL: Do you expect this
12 to be a -- you know, a short -- you did say
13 short, so -- well, let's see what happens. Go
14 ahead, Mr. Carroll.

15 MR. CARROLL: With that clock
16 spinning, I am going to try to do this in 10
17 minutes. All right? Here we go.

18 JUDGE SIPPEL: Go to it.

19 MR. CARROLL: Throw something at
20 me if I miss it.

21 (Laughter.)

22 DIRECT EXAMINATION

1 BY MR. CARROLL:

2 Q Mr. Burke, what is your position
3 currently?

4 A I am the President of Comcast
5 Cable, and the Chief Operating Officer of the
6 company.

7 Q How long have you had that
8 position?

9 A I have been with the company about
10 10-1/2 years. I have essentially had that
11 position the entire time.

12 Q So you are basically the number
13 two in the company?

14 A Yes.

15 Q And, very briefly, what did you do
16 before coming to Comcast?

17 A Worked at the Walt Disney Company
18 for about a dozen years, and before that
19 General Foods and business school, and then
20 before that college.

21 Q Okay. I am going to move right to
22 the events at issue in this case.

1 JUDGE SIPPEL: Do we have his
2 first name? Is it --

3 MR. CARROLL: Stephen.

4 JUDGE SIPPEL: Mr. Stephen Burke.
5 All right.

6 MR. CARROLL: Stephen Burke.

7 JUDGE SIPPEL: And do we have
8 written testimony?

9 MR. CARROLL: We do. And, Your
10 Honor, may I distribute this? This is Comcast
11 -- this is Comcast Exhibit 1.

12 JUDGE SIPPEL: Comcast Number 1.

13 MR. CARROLL: Comcast Number 1,
14 the direct testimony of Stephen Burke.

15 JUDGE SIPPEL: Okay. Let's have
16 it. Thank you. If you have another one, we
17 can use three up here. I don't know if you
18 do, but -- if you don't, that's okay.

19 MR. CARROLL: We'll wrestle with
20 it.

21 JUDGE SIPPEL: Oh, we have it?
22 We're all set. We have it. We have it.

1 BY MR. CARROLL:

2 Q First, we will do an
3 identification. I have handed you what has
4 been marked as Exhibit 1.

5 (Whereupon, the above-referred to
6 document was marked as Comcast
7 Exhibit No. 1 for identification.)

8 Can you just confirm that's a copy
9 that you signed of your direct written
10 testimony in this matter?

11 A It is.

12 Q Very good. Now let's do a quick
13 summary. As the President of Comcast, did you
14 become involved in 2004 in some negotiations
15 with the NFL related to a contract between
16 Comcast and the NFL?

17 A Yes, I did.

18 Q And during those negotiations, did
19 you participate/communicate directly with
20 anybody on the NFL side?

21 A Yes.

22 Q Who on the NFL side did you have

1 discussions with?

2 A Steve Bornstein was the primary
3 person on the other side.

4 Q Anyone else that you dealt with?

5 A I believe he had a gentleman named
6 Adam Shaw that was working for him, but
7 primarily Steve.

8 Q Did you deal at all with Mr.
9 Tagliabue and Mr. Craft?

10 A We did as it related to the
11 potential acquiring of games for Versus.

12 Q Okay. And I want to focus on that
13 for a second. Was there a phrase that was
14 used at the time in the negotiations with
15 respect to acquiring the rights to games, do
16 you remember?

17 A If you are referring to we needed
18 to carry the NFL Network to join the club to
19 be able to go after games?

20 Q Yes.

21 A Yes.

22 Q Who told you that during those

1 negotiations?

2 A Steve.

3 Q Steve?

4 A Bornstein.

5 Q Did you also hear that said by Mr.

6 Tagliabue or Mr. Craft in any of your

7 discussions?

8 A I don't recall ever hearing it

9 from Mr. Tagliabue or Mr. Craft.

10 Q But you heard it directly from Mr.

11 Bornstein.

12 A Multiple times.

13 Q Okay. And you remember those

14 times?

15 A I sure do.

16 JUDGE SIPPEL: You can move this

17 in any time you want.

18 MR. CARROLL: Sure. We'll move in

19 the written direct testimony of Mr. Burke.

20 JUDGE SIPPEL: Any objection?

21 MR. SCHMIDT: No objection, Your

22 Honor.

1 JUDGE SIPPEL: It is Comcast
2 Number 1. It has been identified and it is
3 received now as Comcast 1.

4 (Whereupon, the above-referred to
5 document, previously marked as
6 Comcast Exhibit No. 1 for
7 identification, was received into
8 evidence.)

9 Proceed, Mr. Carroll.

10 MR. CARROLL: Thank you, Your
11 Honor.

12 BY MR. CARROLL:

13 Q And what kind of carriage did
14 Comcast agree to under the contract that was
15 finally signed in 2004?

16 A We agreed to put the NFL Network
17 on what we call D2, which is digital -- a
18 digital carriage tier.

19 Q And did you also obtain under the
20 same contract any rights with respect to this
21 joining the club?

22 A Well, in addition to putting the

1 product on the D2 tier, we also obtained the
2 right to tier the product to a sports tier,
3 should the NFL put NFL games on the network.
4 And beyond that, we then I guess obtained the
5 right to sit down with the NFL and talk about
6 acquiring games for Versus.

7 Q Okay. Were there rights to Sunday
8 Ticket that were covered by the contract,
9 negotiation rights for Sunday Ticket?

10 A Should we, by a certain date, not
11 get Sunday Ticket games or games for Versus,
12 we then had the right to tier.

13 Q Okay. And the right to tier, was
14 that an important right to you under the
15 contract?

16 A I would not have signed the
17 contract without it.

18 Q And why is that?

19 A Because, in effect, we would have
20 been opening the company up to almost
21 unlimited financial liability. In effect,
22 once you put the NFL Network on, if the NFL

1 then had a unilateral right to put eight or 16
2 or 24 games on with any kind of fee that they
3 wanted to, you would in effect be signing a
4 contract with an almost unlimited financial
5 liability, which we would not do.

6 Q And did you express that view
7 during the negotiations to the NFL
8 representatives as well?

9 A Yes, I did.

10 Q Did they ever disagree with your
11 perspective?

12 A No, they understood it. And, in
13 fact, Steve Bornstein said, "I understand. I
14 wouldn't sign a deal that didn't have that
15 right." And then, we worked on the idea of
16 trying to craft a solve for that issue, and
17 the solve was if we had the right to put it on
18 a sports tier we would be in no way worse off
19 than if we just said we are not going to sign
20 a deal to put it on D2 carriage.

21 Q And did anybody from the NFL,
22 during your discussions with them back in

1 2004, ever allege that this tiering right that
2 you would have would violate FCC rules or
3 anything like that?

4 A No.

5 Q Okay. Now let's move forward to
6 -- more than a year I guess to the end of
7 2005, early 2006. Did you come to be involved
8 in negotiations with the NFL, again, with
9 respect to an eight-game package?

10 A I did.

11 Q And who did you deal with during
12 those negotiations?

13 A The main people in the NFL side
14 would have been Roger Goodell, who is now the
15 Commissioner. Paul Tagliabue was fairly
16 disengaged at that point, because it was clear
17 that he would not be the Commissioner once the
18 new packages took effect. So Roger really
19 took the lead.

20 And then, Roger had a gentleman
21 named Eric Grubman, who I think was the CFO of
22 the NFL -- NFL Enterprises who did a lot of

1 the negotiating, because at a certain point it
2 became clear that our real competition was the
3 NFL Network, which was run by Steve Bornstein.
4 So I think the NFL was trying to have a
5 situation where we could present our case to
6 people who weren't then going to be running
7 the alternative bidder.

8 Q Okay. And the negotiations that
9 transpired, then, late '05/early '06 to
10 acquire the eight games, for what network were
11 you acquiring them?

12 A They would have been for Outdoor
13 Life, which is now Versus.

14 Q At the time it was known as OLN?

15 A That's correct.

16 Q And now that is the same as
17 Versus. You just renamed it?

18 A That's correct.

19 Q And what kind of a channel -- I am
20 not sure that His Honor has heard this before.
21 What is OLN Versus? What kind of programming
22 does it have?

1 A Outdoor Life is a channel that
2 started out as a -- literally an outdoor
3 channel that had hunting and fishing and a
4 variety of outdoor activities on it. And
5 then, over time, the channel morphed to
6 include more -- different types of sports, not
7 professional sports until we got the rights to
8 the NHL right around the time you're speaking
9 of, but sports like the Tour de France or
10 bull-riding or a variety of other sports.

11 So it -- I would call it a general
12 sports channel, not of the stature of ESPN,
13 certainly it doesn't have all of those games,
14 but it is a general sports channel.

15 Q And how old was the channel? Was
16 that a brand-new channel in 2005, or had that
17 been around for a while?

18 A No. I think Outdoor Life has been
19 around 15 or 20 years. I'm not sure of the
20 exact date, but it has been around a long
21 time.

22 Q And at what level had it been

1 carried for those years?

2 A Most cable companies carried
3 Outdoor Life on what we call analog, which is
4 fully distributed, because its launch pre-
5 dated the launch of digital.

6 Q I see. It was actually launched
7 before there was even digital.

8 A That's right.

9 Q And during the negotiations in
10 late '05/'06 that you had with Mr. Goodell, or
11 the discussions with then-Commissioner
12 Tagliabue, did you ever make any threats to
13 Mr. Tagliabue?

14 A No.

15 Q Did you ever threaten that the
16 cable industry would do anything to him if you
17 didn't get these games?

18 A No. We discussed how difficult
19 getting carriage in the cable industry would
20 be for a new channel or even a channel like
21 Outdoor Life that had more expensive
22 programming, but would never make a threat.

1 Q Did Mr. Tagliabue or Mr. Goodell
2 at the time ever complain about any --

3 A No.

4 Q -- types of threats?

5 A No. All the discussions were very
6 friendly. It was a courtship process. We
7 were one of a number of companies that was
8 trying to get the rights to the games. So it
9 was all very friendly, and we had a lot of
10 meetings.

11 MR. CARROLL: Do we have a
12 Blackberry problem?

13 JUDGE SIPPEL: Hold on just a
14 second here.

15 THE WITNESS: I do, but I think I
16 turned it off. It should be off.

17 JUDGE SIPPEL: We're getting
18 interference. Do you want to hand it to
19 somebody out of the line?

20 THE WITNESS: Yes, sure.

21 JUDGE SIPPEL: Maybe it's because
22 you are in direct line.

1 THE WITNESS: Any better?

2 JUDGE SIPPEL: Let's see.

3 THE WITNESS: I thought it was
4 off. Sorry.

5 JUDGE SIPPEL: It probably was,
6 but maybe there is still something lingering.

7 BY MR. CARROLL:

8 Q Was there any discussion during
9 the negotiations in late '05/early '06 in
10 which the subject of tiering came up at all --

11 A No.

12 Q -- with the NFL?

13 A Well, we -- we wanted to make sure
14 that when the NFL -- what happened was there
15 were maybe a few suitors other than us for the
16 games. I think NBC Universal was interested,
17 I think Fox was interested, and at a certain
18 point the NFL said to us, "We are either going
19 to go with Outdoor Life, or we are going to
20 put the games on the NFL Network."

21 At that point, as it became clear
22 -- and we talked a lot about this, that they

1 were looking at two financial analyses, how
2 much they would make if the games went on
3 Versus versus how much the league would make
4 if the games went on the NFL Network.

5 We wanted to make it clear that
6 when they were doing the NFL Network analysis
7 they should factor in the fact that we would
8 not necessarily be keeping the games on D2,
9 and would, in fact, consider the possibility
10 of putting them on a sports tier.

11 Q And who did you make that -- have
12 that conversation with?

13 A Mr. Goodell, Mr. Grubman, Mr.
14 Bornstein.

15 Q And when you had that, did any of
16 them object in protest in any way?

17 A No.

18 Q Did any of them say, "You don't
19 have a tiering right"?

20 A No.

21 Q Did any of them say, "That's a
22 threat, don't mention that," anything like

1 that?

2 A No.

3 Q They were all very cordial
4 discussions?

5 A Yes.

6 Q But you lost out and didn't get
7 the game package, correct?

8 A That's correct.

9 Q Okay. Now, did you make a
10 decision right when you lost the game package
11 to tier NFL Network?

12 A No. That was my leaning, but we
13 did not make the decision then.

14 Q When was that decision finally
15 made, and how much later was it?

16 A I don't recall. Months later. I
17 mean, there was no reason to make the decision
18 at the time.

19 Q Okay.

20 A And, in fact, we feared when we
21 announced that we were going to be tiering it
22 that the NFL would do things to make our life

1 difficult in terms of press and everything
2 else. So there were reasons to actually push
3 off the formal decision for a while, and there
4 was no reason to make it then.

5 Q Why did you fear that from the
6 NFL?

7 A Because they had taken ads out
8 against Time Warner, and I believe they were
9 in a lawsuit with Charter and maybe somebody
10 else. And, you know, they made it really
11 clear that they wanted to get these games
12 distributed, and they had shown by their
13 actions that they were prepared to go after
14 people that didn't distribute them.

15 Q Go after them in lawsuits and
16 with --

17 A Yes, and in the press.

18 Q Did the NFL, after it kept the
19 games for itself, do anything to the price
20 under your contract?

21 A At a certain point, the NFL
22 notified us that if we were going to keep the

1 games we would have to pay I believe it was a
2 [REDACTED] surcharge over and above the current
3 rate, which was about [REDACTED]

4 Q Okay. And did you make the
5 decision to tier the network before you got
6 that price increase, or after the price
7 increase?

8 A I think the final decision was
9 after the price increase.

10 Q And why did you make the decision
11 to tier after you got the price increase?

12 A Well, because for [REDACTED] for the
13 eight games occurring on Thursday and Saturday
14 night during a five-week period, the [REDACTED]
15 would have equated to something like [REDACTED],
16 [REDACTED] in incremental cost, either to us
17 or if we passed it on to our customers. And
18 it didn't seem that the price value was there.
19 It seemed like it was overpriced for the value
20 that the network would be delivering.

21 Q So by tiering the product, did you
22 save yourself in effect that [REDACTED]